80-890

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES J. LIOTTA,
Petitioner/Cross-Respondent

v.

NATIONAL FORGE COMPANY
Respondent/Cross-Petitioner

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Is a defendant entitled to summary judgment where plaintiff has responded by affidavit setting forth specific facts showing that there is a genuine issue for trial?

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ARGUMENT IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI

Federal Rule 56(e) provides: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

The decision of the Third Circuit Court of Appeals (reproduced in Cross-Respondent's Petition for Writ of Certiorari, A-5 et seq.) makes clear that the Court relied, not on an EEOC "charge," but on an affidavit attached to the charge. A-10. The affidavit itself is set forth in pertinent part at A-11. Reviewing Cross-Respondent's affidavit the Third Circuit Court of Appeals found that "contrary to the Company's argument, it is clear that Liotta has set forth specific facts, not merely conclusory allegations. . . ." A-12. Accordingly the Court held that Cross-Respondent had

met his burden under Rule 56(e).

Cross-Petitioner's authorities do no more than reiterate the requirements of Rule 56(e). This Court's decision in First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) simply states at 289 that "a party cannot rest on the allegations contained in his complaint." The cited Notes to Rule 56, presumably the Notes of 1963 to the amendment of Rule 56(e), repeat that a party cannot rest on his pleadings. 6 MOORE'S FEDERAL PRACTICE AND PROCEDURE (1976) 56-21 and 22. In United States ex rel. Kolton v. Halperin, 260 F.2d 590 (3d Cir. 1958), the Court at 591 found the affidavit of a plaintiff sufficient and rejected an affidavit by defendant's counsel.

CONCLUSION

For the foregoing reasons the Cross-Petition should be denied.

Respectfully submitted,

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